

IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996 c. 367

AND

IN THE MATTER OF A REVIEW OF ALLEGATIONS OF MISCONDUCT AGAINST
CERTAIN OFFICERS OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

TO: Mr. [REDACTED] (the "Complainant")
C/O [REDACTED], Counsel ("Counsel")

AND TO: Constable [REDACTED] (Cst. "A")
Constable [REDACTED] (Cst. "B")
Constable [REDACTED] (Cst. "C")
Constable [REDACTED] (Cst. "D")

(Hereinafter collectively called the "Members")

c/o Vancouver Police Department
Professional Standards Section

AND TO: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

AND TO: Sgt. [REDACTED], Investigator (the "Investigator")
Vancouver Police Department
Professional Standards Department

AND TO: Mr. Clayton Pecknold
Police Complaint Commissioner (Commissioner)

**ADJUDICATOR'S DECISION PURSUANT TO SECTION 117(7) OF THE POLICE ACT
R.S.B.C. 1996, c.367 AND AMENDMENTS THERETO**

AND NOTIFICATION OF NEXT STEPS

I- Decision Summary

1. This is a decision made pursuant to section 117(7) of the *Police Act* relating to certain complaints of misconduct concerning the Members. The misconduct involving the Complainant is alleged to have taken place February 20, 2019 at the [REDACTED] Hotel, [REDACTED] St, Vancouver, BC (the "[REDACTED] Hotel").
2. I have been appointed Adjudicator in connection with this matter as a result of the Commissioner's order of August 11, 2020 made in accordance with section 117(4) of the *Police Act*.
3. As set out below, in accordance with my appointment as Adjudicator, I have considered the evidence available in relation to the following specific allegation of misconduct by the Members:

That on February 20, 2019, the Members committed Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the Police Act by intentionally, or recklessly, using unnecessary force in the course of their arrest of the Complainant;

("Misconduct Allegation # 1")

4. I have also considered whether or not in all of the circumstances an additional allegation of misconduct by *Neglect of Duty* pursuant to 77(3) (m) (ii) of the *Police Act* appears appropriate in relation to the actions of Cst. B.

("Misconduct Allegation # 2").

5. Misconduct Allegation # 2 relates to a concern raised by the Commissioner that Cst. B failed to comply with a duty to appropriately report injuries sustained by the Complainant during the course of his arrest.

6. Collectively, Misconduct Allegation # 1 and Misconduct Allegation # 2 are referenced in this decision as the Misconduct Allegations (the “Misconduct Allegations”).
7. My conclusions reached as a result of a review of the Misconduct Allegations in the context of the Final Investigation Report dated July 3, 2020 (the “FIR”) are set out in detail below, but can be summarized as follows:
 - (a) With respect to Misconduct Allegation # 1 and Cst. B, the evidence considered appears sufficient to substantiate the alleged misconduct, potentially requiring consideration of disciplinary or corrective measures.
 - (b) With respect to Misconduct Allegation # 2, the evidence does not appear to be sufficient to substantiate that allegation of misconduct with respect to Cst. B.
 - (c) With respect to Cst. A, Cst C and Cst. D, the evidence considered does not appear sufficient to substantiate Misconduct Allegation # 1, against any of those members.
8. In accordance with section 117(11) of the Police Act, my decisions on matters that do not appear to be substantiated are final and conclusive.
9. The next steps are set out below, but will commence with a new disciplinary hearing on the substantiated misconduct allegation involving Cst. B, that being Misconduct Allegation # 1.

II History of Proceedings and details of the Complaint - Section 117(8)a

10. On February 20, 2019, an incident took place at the ████████ Hotel in Vancouver that resulted in the arrest of the Complainant and ultimately, his hospitalization.
11. On August 26, 2019, Counsel, acting on behalf of the Complainant, submitted a registered complainant to the Office of the Police Complaint Commissioner (the “OPCC”) with respect to the circumstances of his arrest (the “Complaint”). The Complaint included a very brief summary of allegations made by the Complainant detailing injuries allegedly sustained during the course of his arrest by the Members.
12. Following a review by OPCC staff, the Complaint was accepted as admissible and forwarded to the Professional Standards Section of the Vancouver Police Department for investigation.
13. As noted in the Complaint, the misconduct alleged related to the Members’ inappropriate use of force with respect to the Complainant during the course of his arrest and removal from the ████████ Hotel. Specifically, allegations were made against all Members of abuse of authority in the use of force, thereby engaging consideration of section 77(3)(a)(ii)A of the *Police Act*.

14. The Investigator completed her investigation and submitted the FIR to the relevant discipline authority, Inspector [REDACTED] VPD (the “Discipline Authority”) on July 3, 2020.
15. On July 17, 2020, the Discipline Authority issued his decision pursuant to section 112 of the *Police Act* concerning this matter. The Discipline Authority found that Misconduct Allegation # 1 was not substantiated for any of the Members. The Discipline authority does not appear to have specifically addressed Misconduct Allegation # 2, (raised by the Commissioner) although the Investigator did report on the issue at page 95 of the FIR.
16. In an order made August 11, 2020, the Commissioner determined that there was a reasonable basis to believe that the decision of the Discipline Authority was incorrect.
17. Specifically, the Commissioner expressed the view that the Discipline Authority was incorrect in finding that the use of force by the Members during their arrest of the Complainant appeared to be justified in all of the circumstances negating any conclusion of misconduct.
18. The Commissioner also appears to have taken the position that the Discipline Authority should have added and assessed an additional misconduct issue concerning Cst. B . That issue related to an alleged failure by Cst. B to report on the injuries sustained by the Complainant during his arrest as required by section 108 of the *Police Act* and VPD policy VPD RPM -1.16.7.
19. This review has focused on analysis of the Misconduct Allegations in the context of the FIR.

III Section 117

20. The statutory authority governing this review is found in section 117 of the *Police Act*.
21. Specifically, subsection 117(6) of the *Police Act* imposes a duty on the Commissioner to provide the Adjudicator with copies of all reports under section 98, 115 and 132 that may have been filed with the Commissioner prior to the Adjudicator’s appointment in relation to the allegations of misconduct.
22. The central role of the Adjudicator as set out in subsections 117 (8) and 117(9) of the *Police Act* is to independently review the material delivered under subsection 117(6), and to determine whether or not the conduct of any of the Members appears sufficient to substantiate misconduct within the meaning of Part 11 of the *Police Act* requiring disciplinary or corrective action.

23. The law is clear that a review under section 117 is a paper based process of the record provided by the Commissioner. It takes place without live witnesses, additional evidence or submissions from any of the parties involved. The review is not an appeal of earlier decisions concerning misconduct nor is it a redetermination in any manner of other proceedings, including court proceedings, that may have a connection to the misconduct alleged. Nor is the Adjudicator's role to decide the facts concerning the matters in issue at this stage in the process. Rather, the adjudicative role in this part of the process is to determine whether or not the evidence appears to substantiate potential misconduct requiring some form of sanction or corrective measures.
24. The duty of an Adjudicator under subsection 117(1)b is to reach their own conclusions based on the materials submitted for review without submissions or further evidence adduced by way of a hearing.
25. The Supreme Court of British Columbia provided useful specific guidance on the role of Adjudicators serving under section 117 of the *Police Act*. In *Scott v. British Columbia (The Police Complaint Commissioner)*, 2016 BCSC 1970, the Honourable Mr. Justice Affleck considered an earlier Adjudicator decision provided under section 117, noting as follows:

[27] *There are two troubling aspects to the approach to his task taken by the retired judge.*

[28] *The first is his implicit interpretation of s. 117(9) of the Act that it permitted him at an early stage of his inquiries to reach conclusions about the petitioner's conduct.*

[29] *In Florkow v. British Columbia (Police Complaint Commissioner), 2013 BCCA 92, Newbury J.A. observed that part XI of the Act, where s. 117 is found, "is not a model of clarity". Section 117(9) fits that description, but in my opinion, it is clear that it authorized the retired judge to do no more than express a view that the petitioner's conduct on April 22, 2016 "appears" to have been misconduct. To have gone beyond an expression of a preliminary review by giving extensive reasons using conclusory language, such as asserting that the petitioner's "conduct was a marked and serious departure from the standard reasonably expected of a police officer" is not consistent with the scheme and object of the Act and the intention of the legislature (see Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21.*

[30] *In my opinion the legislature did not intend the retired judge, whose ultimate role could include presiding over a disciplinary hearing involving the very person whose conduct he had already determined was improper, nevertheless could use language, before a hearing had taken place, that on any reasonable reading left no doubt in the mind of the petitioner that the retired judge had already made up his mind that the petitioner was guilty of the misconduct alleged.*

[37] *In my opinion, the retired judge improperly conflated the issue of whether the petitioner was in the course of his lawful duties when he entered the complainant's home and arrested her, with the other issue of whether the petitioner was guilty of*

misconduct by abusing his authority as defined in the [Police Act](#). That conflation is apparent from the retired judge's conclusion that:

It follows, therefore, that the question of whether A/S Scott abused his authority must be determined according respect for the factual findings of the trial judge. Respect for those findings of fact would result in the conclusion that A/S Scott had abused his authority. ...

[39] Section 117 of the [Police Act](#) is unfortunately worded in some respects. On one possible interpretation a retired judge appointed pursuant to the [Act](#) is directed to reach conclusions about the conduct of a member of a police force before a disciplinary hearing has been conducted by the retired judge in respect of that conduct. I do not accept the legislature intended such an approach to be taken. If that was the appropriate interpretation it would inevitably raise a serious issue of an apprehension of bias when the retired judge made preliminary findings adverse to the petitioner and was then required to conduct a disciplinary hearing. I conclude that the retired Judge adopted an interpretation which has now led to that unfortunate outcome.

26. This review has been undertaken in accordance with the foregoing principles and law.

IV Records submitted for review

27. In accordance with subsection 117(6) of the *Police Act*, the Commissioner has provided the FIR for my review which was prepared by the Investigator. Also included was a flash drive providing electronic copies of the FIR documents and videos detailing much of the encounter with between the Members and the Complainant. The comprehensive and detailed FIR, dated July 3, 2020, comprises 100 pages of narrative, plus extensive related attachments. It details the evidence of all relevant parties concerning the Misconduct Allegations.

28. The FIR and related materials were delivered to me September 3, 2020. Section 117(9) of the *Police Act* confirms that my review must be completed within 10 business days with notice to the relevant parties of my decision and next steps.

V Misconduct and the Police Act- Allegations considered **– Section 117(8)c and 108 Police Act**

29. The evidence set out in the FIR outlines the perspectives of the Members, civilian witnesses and EHS personnel concerning the unfolding events involving the Complainant. The report

also includes extensive collateral materials on medical records, Vancouver Police Department policies, case law and general principles associated with use of force training.

30. The FIR does not, however, contain material outlining the details of the Complainant's perspective of events, beyond the initial brief Complaint. The lack of this material is solely the responsibility of the Complainant. Through Counsel, the Investigator made multiple attempts to secure additional evidence on the Complainant's perspective with respect to the facts relating to his arrest, and specifics of injuries sustained by the Complainant. (The Investigator had been instructed by Counsel not to approach the Complainant directly.) Notwithstanding those efforts, no such material was produced.
31. Fortunately, as noted above, a series of video recordings arising from an internal security system in the [REDACTED] Hotel have been made available and incorporated into the FIR. These recordings provide an important series of perspectives of the various interactions between the Complainant, Hotel staff and the Members.
32. Turning to the specifics of possible misconduct under Misconduct Allegation # 1, section 77 of the *Police Act* provides, in part, as follows:

77(1) In this Part, "misconduct" means

(a) conduct that constitutes a public trust offence described in subsection (2), or

(b) conduct that constitutes

(i) an offence under section 86 [offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offence to hinder, delay, obstruct or interfere with investigating officer], or

(ii) a disciplinary breach of public trust described in subsection (3) of this section.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:

(a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,

(ii) in the performance, or purported performance, of duties, intentionally or recklessly

(A) using unnecessary force on any person, or

(B) detaining or searching any person without good and sufficient cause.

33. An important overall limitation to the definitions of misconduct in section 77 of the *Police Act* is found in subsection 77(4) as follows:

77(4) It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work.

34. Misconduct Allegation # 2 appears to be governed by section 108 of the *Police Act* which provides as follows:

108 (1) *If, during the course of an investigation,*

(a) information comes to the attention of an investigating officer concerning the conduct of a member or former member of a municipal police department,

(b) the conduct is not the subject of the investigating officer's investigation, and

(c) the conduct would constitute misconduct, if the information were substantiated,

the investigating officer must immediately report the information to a chief constable of that municipal police department, unless subsection (2) applies, and to the police complaint commissioner.

35. Also, of apparent relevance to Misconduct Allegation # 2 are the specific policies of the VPD concerning the reporting of injuries and the use of weapons, including conductive energy devices. These are policies 1.16.7 and 1.2.1.

36. This review must independently assess the circumstances of each Member's interactions with Complainant, the actions of the various parties and the totality of the circumstances relating to the same as set out in the FIR. This includes consideration of the rapid escalation of the use of force by the Members, and the subjective and objective, rationale behind that use of force in the context of section 77 of the *Police Act*.

VI The Evidence arising from the Final Investigation Report

37. My review of the FIR and the evidence and records referenced in it discloses the following evidence, which if proven, may have relevance to the questions of misconduct raised in this review. I note, of course, that identifying the facts that appear to form the basis of evidence relevant to the allegations does not result in the conclusion that such facts will ultimately be proven.

38. The evidence in the FIR that I have considered relevant to the matters in issue appears to confirm the following general evolution of events:

VII The initial complaint to VPD by [REDACTED] Hotel Staff

- (a) On February 20, 2019, at approximately 9:53 am, staff at the [REDACTED] Hotel called 911 to report an unwanted male person in the hotel lobby. The complaint noted that the male was trying to gain access to the elevator, and being argumentative in doing so. The hotel staff confirmed that the individual of concern had done nothing physical of concern, but was harassing staff verbally and leading staff to feel uncomfortable. The caller requested assistance in removing the male from the hotel property;
- (b) A second 911 call was received from a [REDACTED] Hotel tenant at approximately the same time. In this report, the caller stated that a male was “chasing a female in the lobby” and “grabbing and threatening” a male staff member. The caller did not report any violence or punches and confirmed that he had retreated to his room away from the lobby area;
- (c) In neither report was any advice provided that “weapons” were seen associated with the alleged disturbance;
- (d) At 9:56:30 a 911 dispatch classified the calls as a “priority 3” relating to a “disturbance” and an “unwanted person”. A general dispatch broadcast was made to provide the hotel with assistance; and
- (e) The 911 dispatch noted that the subject male was being argumentative, although no significant physical interaction was reported. Dispatch advised that the hotel wanted the subject removed from the premises;

Viii Arrival of Cst. C

- (f) Cst. C initially responded to the general dispatch advising that she would “head up”. Cst. A also independently confirmed that he would attend as well;
- (g) At 10:00:44 Cst. C arrived at the hotel and entered the lobby;
- (h) Cst. C, in full uniform, approached the Hotel lobby and identified herself to the people at the counter. She asked staff at the counter to confirm the subject of their call for assistance. The Complainant, then standing at the front counter was quickly identified. He was a large male, over six feet tall with an estimated weight of 250 pounds;
- (i) Cst. C again identified herself as a police officer, addressed the Complainant and began a dialogue requesting he confirm his identity. Cst. C’s demeanor was calm, professional and focused on the Complainant;
- (j) The Complainant promptly responded to Cst. C providing a first name and birthdate. However, when asked to spell his first and last names, the Complainant was unable to do so;
- (k) Cst. C noted that the Complainant was calm and at that time appeared focused on the person behind the lobby counter. The member reported that in her discussion with the Complainant, she was attempting to talk him down from whatever he was fixated on;
- (l) At 10:01 33 Cst. C took a moment and dispatched a brief report by radio that she was talking to the Complainant and that he appeared calm;

- (m) Cst. C continued her de-escalation dialogue attempts encouraging the Complainant to voluntarily leave the premises. However, Cst. C was receiving nonsensical responses in reply from the Complainant and no move was made to leave as requested;
- (n) At approximately 10:03, Cst. C made a second set of entries into her notebook;
- (o) At approximately 10:03:54, Cst. C attempted a hand gesture to the Complainant indicating that he should leave, however, in response the Complainant did not leave but rather put his hands behind his back and moved closer to the member staring at her;
- (p) In response, Cst. C put her hand up and told the Complainant not to get too close to her. In response, the Complainant immediately backed away from the member, complying with Cst. C's direction;
- (q) Cst. C's elapsed time on scene at this point was approximately three minutes;

IX Arrival of Csts. A & B

- (r) At approximately 10:04, Cst. A and Cst. B, both in full uniform, arrive in the lobby area immediately flanking Cst. C At this point;
- (s) In apparent response to the arrival of the two additional members, the Complainant moved away from the lobby counter to the far west side of the lobby. As well, it appears that at this point the Complainant was beginning to demonstrate signs of increased agitation, including muttering to himself and pacing;
- (t) Cst. B was on duty that evening as a member specifically trained and equipped with a conductive energy weapon, or TASER ("CEW"). Cst. B immediately took over communication with the Complainant from Cst. C;
- (u) The Complainant did not appear to respond to the communication attempts of Cst. B;
- (v) At approximately 10:04:50 Cst. B snapped his fingers and in response, the Complainant briefly appeared to turn towards the member, and then turned away;
- (w) At this point it appears that the Complainant was at the lobby counter continuing to have his hands held behind his back, with Cst. B approximately five feet to his right. Cst. A and Cst. C appear to have been positioned behind the Complainant, each several feet away;
- (x) At approximately 10:05, the Complainant appeared to turn and move away from the lobby counter in the direction of the lobby window and chairs;
- (y) Noted to be in that general area were an unspecified number of potted plants, some furniture and a large metal safe. The Members appeared to follow the Complainant, effectively encircling him in the window area;
- (z) At approximately 10:05:03 Cst. D arrived on scene, also in full uniform, and joined the other Members encircling the Complainant;
- (aa) Cst. B appears to have continued his brief dialogue attempts and commands directed to the Complainant without response;
- (bb) Cst. A reported that Cst. B specifically told the Complainant that he was under arrest and gave commands to lay on the ground;
- (cc) Slightly more than a minute after arriving on scene, Cst. B appears to have drawn his CEW, raised his right arm and directed the weapon towards the Complainant;

X Discharge of the CEW (Taser) by Cst. B

- (dd) At this stage it does not appear that the Complainant was known to any of the Members, nor did they appear to be aware of his apparent criminal record;
- (ee) Fifteen seconds after the CEW was drawn and pointed at the Complainant, it appears that there was still no response to Cst. B's commands;
- (ff) It appears that Cst. B then discharged the CEW hitting the Complainant in the lower left torso. All Members immediately moved in to attempt to take the Complainant into custody;
- (gg) The CEW appears to have partially succeeded in bringing the Complainant to his knees, however, did not immobilize him. As such, the initial efforts at apprehension and the application of handcuffs did not appear to succeed. Indeed, it is clear that the Complainant was at that point actively resisting the Members as they tried, with considerable difficulty, to subdue and control the Complainant;
- (hh) The CEW use records reported in the FIR at page 55 show that the weapon was "triggered" five times each for a 5 second duration. The Investigator concluded that the records were consistent with Cst. B's statements on the deployment of the CEW assigned to his use. (It is not clear that the times in the CEW report match the video or radio logs, however, there is no other report of CEW use by Cst. B on February 20, 2019 in the FIR);
- (ii) Cst. B appears to have immediately recognized that the initial CEW discharge was not completely effective in subduing the Complainant. As noted, it appears that up to 5 additional discharges were triggered by Cst. B, however, the result was not effective, likely due to an incomplete penetration of the CEW probes. As well, Cst. B was apparently unable to load a new CEW cartridge while struggling to restrain the Complainant;
- (jj) Recognizing that the CEW alone would not subdue the Complainant, it appears that Cst. B changed tactics and struck the Complainant in the head several times with the CEW unit in an attempt to stun or distract the subject. Cst. B also applied several kicks to the partially standing Complainant;
- (kk) Cst. D appears to have applied a knee strike to the Complainant's mid-section. He then continued with baton strikes to the Complainant's arms and upper thighs, again, in an attempt to help gain control of the Complainant to facilitate his arrest;
- (ll) Cst. A appears to have delivered knee strikes to the Complainant's thigh and side to no apparent effect. Like the other Members, Cst. A was issuing loud commands to the Complainant to lay down and stop resisting because he was under arrest;
- (mm) Cst. C appears to have attempted to assist in the arrest by making efforts to grab the Complainant's legs during the struggle following discharge of the CEW;

XI Arrest, follow up and transfer of Complainant to Hospital

- (nn) Ultimately, after a significant struggle with the Members, the Complainant appears have been subdued, cuffed and hobbled completing his apprehension;

- (oo) The Complainant was then removed from the Hotel and placed in the care of Emergency Health Service (“EHS”) paramedics who had just arrived on scene. The assessment of those professionals appears to have been that the Complainant was “delirious and agitated” with a Richmond Agitation Scale (“RAS”) score of +4. (As detailed in the FIR, such a score equates to an assessment of extreme agitation with delirium with possible violent, aggressive and uncontrollable behaviour);
- (pp) With assistance of unnamed additional members, the Complainant was administered 500 mg of Ketamine by the paramedics to provide some degree of sedation. The Ketamine reduced the Complainant’s RAS score to -1 within a short time.;
- (qq) During this time Cst. B appears to have briefed the NCO on duty that evening who had arrived outside the hotel as the Complainant was placed in the care of EHS paramedics. Cst. B appears to have confirmed to his supervisor that the CEW had been engaged and that the Complainant was being treated by EHS prior to transfer through to the hospital;
- (rr) Cst. C assumed responsibility for retrieving the CEW prongs from the Complainant with the assistance of EHS paramedics;
- (ss) The primary diagnosis of EHS paramedics was of possible mental health or psychological issues;
- (tt) The Complainant was transported to ██████████ Hospital and admitted for acute psychosis. The only injuries noted by EHS paramedics were minor lacerations to the Complainant’s face. Cst. B appears to have confirmed those injuries in subsequent written reports and specified that they were in the cheek and forehead areas. Cst. A accompanied the Complainant to the hospital and briefed attending staff on the circumstances of the Complainant’s arrest;
- (uu) Cst. A, who had supervised the Complainant’s transfer to hospital was advised by attending physicians that the Complainant had been certified under the *Mental Health Act*;
- (vv) No report of the hospital treatment was provided to the Investigator despite several requests, including requests to the Complainant’s Counsel. As such, there does not appear to be any independent corroboration of the serious injury claims advanced in the Complainant. Nor is there any evidence in the FIR that at any point the Complainant was rendered unconscious during the course of his arrest or transmission to hospital;

XII Reports

- (ww) The Members appeared to have prepared and filed the usual General Occurrence Reports concerning their interaction with and arrest of the Complainant shortly after the completion of the arrest;
- (xx) The Members also each completed a Subject Behaviour Officer Response (“SBOR”) report concerning the arrest. The reports appear to have detailed each member’s recollection of the issues arising affecting the Complainant’s behaviour and their response to the same;
- (yy) Cst. B specifically reported on the pre conditions affecting the discharge of the CEW and the specific nature of the discharge; and

(zz) Cst. B also appears to have reported on his observations with respect to the injuries to the Complainant, and the attendance of EHS paramedics. The report does not appear to contain a description of the multiple injuries claimed by the Complainant. However, as noted above, none of the Members, nor the EHS paramedics, appear to have observed injuries beyond the facial lacerations and CEW prong insertions in their dealings with the Complainant.

XIII Analysis of the Misconduct Allegations- Sections 117(8)(d) & (i) of the Police Act
Does the evidence appear sufficient to substantiate the Misconduct Allegations?

39. I now turn to an analysis of the evidence considering each of the Misconduct Allegations in turn.

40. At this stage I must consider whether or not the evidence adduced in the FIR that is summarized above appears sufficient to substantiate some, or all, of the Misconduct Allegations.

41. This stage of analysis under section 117 of the *Police Act* does not result in findings of fact on any alleged misconduct beyond analysis of whether or not the misconduct allegations appear substantiated against any of the Members based on analysis of the facts set out in the FIR.

XIV Misconduct Allegation (1)

42. The first misconduct allegation relates to the conduct of all Members. Specifically, the allegation to be reviewed is as follows:

That on February 20, 2019 the Members committed Abuse of Authority pursuant to section 77(3)(a)(ii)(A) of the Police Act by using unnecessary force intentionally or recklessly in the course of their arrest of the Complainant;

43. Section 77(3)(a)(ii)(A) provides as follows:

77 (1)*In this Part, "misconduct" means*

(a)conduct that constitutes a public trust offence described in subsection (2), or

(b)conduct that constitutes

(i)an offence under section 86 [offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint] or 106 [offence to hinder,

delay, obstruct or interfere with investigating officer],
or

(ii) a disciplinary breach of public trust described in
subsection (3) of this section.

(3) Subject to subsection (4), any of the conduct described in the following paragraphs
constitutes a disciplinary breach of public trust, when committed by a member:

(a) "abuse of authority", which is oppressive conduct towards a member of
the public, including, without limitation,

(ii) in the performance, or purported performance, of duties,
intentionally or recklessly

(A) using unnecessary force on any person

44. As noted above, the evidence in the FIR describes a two stage encounter between the Members and the Complainant. The initial encounter appears to have been between Cst. C and the Complainant . The second stage of the encounter began with the arrival of Cst. A, Cst. B and Cst. D.
45. It appears that none of the Members used any force in dealing with the Complainant until after Cst. B's discharge of the CEW.
46. It also appears that prior to the use of force by Cst. B, all engagement between the Complainant and the Cst. C appeared to have been professional, focused and calm. As well, the Complainant appeared to have at least partially complied with directions from Cst. C during the course of their engagement prior to the arrival of the other members.
47. With the arrival of Csts. A, C and later D, however, it is quite apparent that the Complainant's state of agitation increased in the relatively small hotel lobby.
48. In considering the lawfulness of the actions of all Members, I am mindful of the context. In *Berntt* [*Berntt v. Vancouver (City)*, 1999 BCCA 345] and *Anderson v. Smith*, 2000 BCSC 1194 the relevant law is summarized as follows at para 51:

[51] Consideration must be given to the circumstances as they existed at the time. Allowance must be made for the exigencies of the moment, keeping in mind that the police officer cannot be expected to measure the force with exactitude: Wackett v. Calder (1965), 51 D.L.R. (2d) 598 at 602 (B.C.C.A.); R. v. Botrell, supra at 218; Allrie v. Victoria (City), [1993] 1 W.W.R. 655 at para 20 (B.C.S.C.); Levesque v. Sudbury Regional Police Force, [1992] O.J. No.512 (QL) (Ont. Gen. Div); Breen v. Saunders (1986), 39 C.C.L.T. 273 at 277 (N.B.Q.B.); Berntt v. Vancouver (City), supra at 217. This may include the aura of potential and unpredictable danger: Schell v. Truba (1990), 89 Sask. R. 137 at 140 (Sask.

C.A.) (in dissent). There is no requirement to use the least amount of force because this may expose the officer to unnecessary danger to himself: Levesque v. Sudbury Regional Police Force, supra.

49. Adjudicator Pitfield said the following about the relevance of exigencies at paragraph 37 of the *Dickhout* decision [*Re: Dickhout*, OPCC PH 2010-03]:

... The assessment of an officer's conduct must respect the fact that his or her job is a difficult one and, in the heat of the moment, frequently does not allow for detached reflection when deciding to act: R. v. Nasogaluak, [cited earlier, paragraph 35] and In the Matter of Constable Smith, Victoria, January 28, 2009, p. 21.

50. As Adjudicator, my review of a member's actions must:

- (a) Take account the exigencies and immediacy of the moment;
- (b) Consider the fact that members are often required to make decisions quickly in the course of an evolving incident, without the detached reflection that is available to those looking back on an incident; and
- (c) Consider that at law, there is no requirement that a member perfectly calibrate his or her actions to the perceived threat.

51. As it appears that the arrest of the Complainant was an initial objective of the Members, section 25 of the Criminal Code also appears to have relevance to this review. Section 25 provides as follows:

"25 (1) *Everyone who is required or authorized by law to do anything in the administration or enforcement of the law*

(b) *as a peace officer or public officer,*

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose."

52. Section 25 must also be considered as part of the analysis of possible misconduct under section 77(3)(a)(i)(A) of the *Police Act*.

53. The specific issues arising with respect to the elements of proof required to be considered in a review of potential misconduct of the Members under section 77(3)(a)(ii)(A) are as follows:

- (a) Were the Members acting in the performance or purported performance of their duties in dealing with the Complainant?
- (b) Did the Members intentionally or recklessly use unnecessary force on the Complainant?
- (c) Did the Members use force on the Complainant without good and sufficient cause?
- (d) Was the conduct of the Members characterized by a serious blameworthy element, not simply a mistake of legal authority or an error forgivable because of a lack of training?

XV Issue (a) – Members acting in Performance of Duties

54. With respect to the first issue, it appears clear that the Members were engaged in the lawful execution of their duty in both investigating a disturbance allegation and also responding to a request from [REDACTED] Hotel management to remove an unwanted person from the hotel property. Two 911 calls had resulted in a priority 3 dispatch to the hotel based on reports related to the actions of the Complainant. It is readily apparent that all Members were at all times engaged in the lawful exercise of their duties as peace officers in their dealings with the Complainant.

XVI Issue (b) -Use of Force

55. With respect to the second issue, it appears without doubt that the Members all used force of varying degrees in their dealings with the Complainant.
56. As noted above, it appears that no force was engaged by any of the Members until Cst. B discharged his CEW. Once the CEW had been discharged, all members present moved past Cst. B to attempt to complete the arrest of the Complainant.
57. I will consider the use of force by each Member separately.

CST. A – Use of Force

58. After discharge of the CEW, Cst. A immediately moved in to secure the arrest of the Complainant. He appears to have briefly gripped the Complainant's arm, however, that hold was quickly lost as the Complainant began to struggle resisting arrest.

59. Cst. A used force by way of knee strikes to the Complainant's thigh and side to attempt to gain control, however, these actions did not appear to have had any material effect on the Complainant.
60. As Cst. A struggled to restrain the Complainant, it appears that the Complainant was pulling away from the Members, kicking and flailing out.
61. It appears that Cst. A was ultimately able to gain control of one of the Complainant's hands to apply a handcuff, however, was unable to immediately gain control of the other hand. As such, Cst. A reported that he simply bore down and held the Complainant until other cover officers arrived.

Cst. B – Use of Force

62. Cst. B appears to have displayed and discharged the CEW in his possession in just over a minute after his arrival on scene.
63. The CEW appears to have partially subdued the Complainant, however, attempts to issue further shocks and reload the CEW did not appear to be successful.
64. As other members moved to control the Complainant after discharge of the CEW, Cst. B also moved in striking the Complainant several times in the face with the CEW unit itself in an attempt to stun the Complainant.
65. Cst. B also appears to have applied several kicks to the Complainant in efforts to subdue him.

Cst. C – Use of Force

66. Cst. C appears to have had a limited physical involvement with the Complainant.
67. Immediately after discharge of the CEW, Cst. C joined her colleagues Cst. A and Cst. D in attempting to control and arrest the Complainant.
68. Cst. C's actions in using force against the Complainant appear to have been restricted to attempting to control his legs by grabbing and leaning on the same as the struggle ensued with the other Members.

Cst. D – Use of Force

69. Cst. D. also appears to have moved in once the CEW discharged. However, it appears that his progress in reaching the Complainant was impeded by furniture in the lobby area.

70. Cst. D appears to have experienced extreme difficulty in dealing with the arrest of the Complainant as he was struggling with the other members.
71. It appears that Cst. D transitioned from attempts as hand grips to the deployment of his baton. Specifically, it appears that Cs.t D delivered multiple strikes with the baton to the Complainant's arm and upper thigh area.
72. Cst. D reported that the baton strikes had no apparent effect on the Complainant as he continued to struggle with the other members present.
73. Ultimately Cst. D confirms that the members were able to attach a handcuff on one hand and eventually the second. With the arrival of cover officers, it appears a hobble was secured to the Complainant's legs.

XVII Conclusion issue (b) - Use of force

74. On the second issue, therefore, it appears that to varying degrees, all Members used force in their attempts to effect the arrest of the Complainant. The next consideration is whether or not that force was intentional or reckless resulting in an unnecessary use of force.
75. It appears beyond doubt that the application of force by the Members was intentional as a means of subduing and controlling the Complainant in the process of completing an arrest.

XVIII Issue (c) - Good and Sufficient cause to use force

76. The third element to be considered is whether or not the Members had "good and sufficient cause" to use force in their dealings with the Complainant.
77. This issue requires consideration of the lawful justification for the use of force for the Members, including analysis of whether or not such force was necessary. In that regard it appears that all of the actions taken by the Members were intended to:
- (a) Subdue and arrest the Complainant removing him from the hotel property; and
 - (b) Ensure the safety of the Members, Hotel [REDACTED] staff, and third parties in the hotel lobby area.
78. I will complete my analysis of this issue by separately reviewing the conduct of Cst. B and the other members. I do so because it is apparent that the use of force by Cst. B is significantly different than that of the other members given the discharge of the CEW.

XIX Cst B. – Standards for use of force by way of CEW

79. Cst. B was the only member present on the date in question trained and authorized to use the CEW.
80. The FIR appears to confirm that Cst. B successfully completed the CEW course in 2017. He was re certified in October of 2019 and was apparently CEW qualified on the date of the incident with the Complainant. As well, Cst. B had at that time completed required training on Use of Force options as outlined in the National Use of Force Framework (the “Use of Force Framework”). Finally, the FIR appears to confirm that Cst. B’s training was valid for the VPD versions of the relevant crisis intervention and de-escalation courses at the time of the incident in issue.
81. Following on the important analysis and recommendations of the 2009 ***Braidwood Commission of Inquiry*** on the use and deployment of conductive energy weapons, provincial policing standards were significantly modified in early 2012, and again in 2015 (the “Provincial Standards”). Section 1.0 of the Provincial Standards covers use of force for all peace officers, including specific direction on the threshold for use of CEWs. These requirements are set out in subsection 1.3 and 1.3.1 of the Provincial Standards published pursuant to the *Police Act*.
82. Sections (1) – (7) of the Provincial Standards provide as follows:

Standards

The chief constable, chief officer, or commissioner must:

CEW discharge

(1) Prohibit officers from discharging a CEW against a person unless:

- (a) The person is causing bodily harm to either themselves, the officer, or a third party; or*
- (b) The officer is satisfied, on reasonable grounds, that the person’s behaviour will imminently cause bodily harm either to themselves, the officer, or a third party.*

(2) In addition to Standard (1) above, prohibit officers from discharging a CEW against a person unless the officer is satisfied, on reasonable grounds, that:

- (a) Crisis intervention and de-escalation techniques have not been or will not be effective in eliminating the risk of bodily harm; and*
- (b) No lesser force option has been, or will be, effective in eliminating the risk of bodily harm.*

(3) Prohibit officers from discharging an electrical current from a CEW on a person for longer than five seconds, unless the officer is satisfied, on reasonable grounds, that:

- (a) *The initial five-second discharge was not effective in eliminating the risk of bodily harm; and*
- (b) *A further discharge will be effective in eliminating the risk of bodily harm.*

(4) Ensure that officers:

- (a) Issue a verbal warning prior to discharging a CEW against a person, unless such a warning would place any person at further risk of bodily harm or imminent bodily harm;*
- (b) Do not discharge a CEW near flammable, combustible or explosive material, including alcohol-based oleoresin capsicum (OC) spray, where there is a risk of these igniting;*
- (c) Do not discharge a CEW against a person where the person is at risk of a fall from an elevated height, unless the officer has reasonable grounds to believe that the potential for death or grievous bodily harm is justified;*
- (d) Do not discharge a CEW against a person in water where there is a danger of the person drowning due to incapacitation from the CEW, unless the officer has reasonable grounds to believe that the potential for death or grievous bodily harm is justified;*
- (e) Do not discharge a CEW against a person operating a vehicle or machinery in motion, unless the officer has reasonable grounds to believe that the potential for death or grievous bodily harm is justified;*
- (f) Do not discharge more than one CEW simultaneously against a person, unless the officer has reasonable grounds to believe that the potential for death or grievous bodily harm is justified; and*
- (g) Avoid a person's head, neck, or genitalia as target zones for discharge of the CEW.*

(5) Ensure that Standards (1) to (4) above apply to discharges in any mode.

CEW draw or display

(6) Prohibit officers from drawing or displaying a CEW unless the officer is satisfied on reasonable grounds that the situation has some potential for bodily harm.

(7) Ensure policies and procedures are consistent with these BC Provincial Policing Standards.

XX Withdrawal and Display of CEW by Cst. B

83. On the evidence set out in the FIR, Cst. B maintains that his decision to draw the CEW was based on the following circumstances:

- (a) The Members had been dispatched to the [REDACTED] Hotel in response to two 911 calls, one reporting a possible assault and another a disturbance with a request to remove a large male from the premises;
- (b) On arrival, Cst. B had observed Cst. C engaged in a conversation with the Complainant with few noticeable responses from the Complainant. As well, it appeared to Cst. B that the Complainant was not complying with Cst. C's directions, although it appears that Cst. B had a very limited time to draw that conclusion;
- (c) The Complainant was seen to be a large male, over 6' tall and weighing near 250 lbs;
- (d) Cst. B reported that his observations of the Complainant showed him to be sweating, with dilated eyes, possibly attributable to intoxication by drugs. He also reported that

the Complainant was clenching his fists and staring through Cst. B maintaining an assaultive, fighting stance;

- (e) Cst. B reported that based on his experience, it would be necessary to control the Complainant by placing him in handcuffs so he could be removed from the scene; and
- (f) Cst. B also reports that he “felt very unsafe” going hands on to handcuff the Complainant. Cst. B believed that use of the CEW would be required in order to subdue the Complainant, complete his arrest and avoid an imminent risk of bodily harm to the Members and others.

84. However, it also appears to be significant that:

- (a) The decision to draw the CEW and point it towards the Complainant took place less than a minute after Cst. B arrived on scene leaving very little time to communicate with Cst. C on her de-escalation efforts or to accurately assess the circumstances surrounding the Complainant;
- (b) The video extracts do not appear to confirm that the Complainant was demonstrating any significant pre-assaultive behaviours. Rather it appears that the Complainant was exhibiting significant signs that he was suffering from some form of delirium or mental health issue; and
- (c) There was no apparent warning to the Complainant that the CEW might be discharged, although Cst. B did apparently warn the Complainant that he was under arrest.

85. Taking into consideration para (6) of the Provincial Standards, it does not appear that Cst. B had reasonable grounds, either objectively or subjectively, to believe that “some potential for bodily harm” existed justifying the withdrawal of the CEW and extension towards the Complainant.

86. Objectively, the following factors appear to have been relevant before the CEW was drawn:

- (a) The Members, and Cst. B, did not appear to have any knowledge of the Complainant’s prior history;
- (b) On arrival none of the Members appear to have witnessed any overt violence or threat to any person or property;
- (c) Although agitated, uncommunicative and apparently confused, it appears evident that the Complainant had been responding to some of the directions given by Cst. C and hence, complying with police directions, in part. Indeed, it appears that Cst. C had a de-escalation strategy engaged, although clearly more time appeared to be required to fully engage the Complainant;
- (d) It appears beyond doubt that the Complainant was subject to lawful arrest as a result of his continued trespass on hotel property and failure to voluntarily comply with member directions;
- (e) The lack of specific pre assaultive cues on the video clips do not appear to support the conclusions reached by some of the Members that the Complainant presented a genuine risk of violent acts to persons or property;
- (f) Viewed objectively, once Cst. A and Cst. B (and shortly thereafter, Cst. D) arrived, it appears that the Complainant’s state of agitation increased as he moved away from the

Members towards the lobby window area. However, again viewed objectively, the presence of 4 officers in a small area might reasonably appear to be threatening to a person with mental health or delirium issues.

87. Subjectively, the following factors appear to have been relevant:
- (a) At the time the CEW was drawn, there were four members in uniform in a small hotel lobby area. They had effectively cornered the Complainant against the lobby window and appeared to have left the communication strategy commenced by Cst. C in favour of a more aggressive series of orders and demands. Cst. B's actions therefore appear to have dramatically changed the course of dealing with the Complainant;
 - (b) Each of the Members appears to have had training in both use of force and de-escalation techniques. As a result, together the four appear to have had the ability to quickly protect any third party from injury and to defuse any attempt at property damage without accelerating the use of force by utilizing a CEW;
 - (c) There does not appear to have been any violence or property damage associated with the Complainant's presence, nor any serious threat to any party. Therefore, there does not appear to have been any urgent need to extract the Complainant from the lobby by force in any manner;
 - (d) Finally, it appears evident that the Complainant was not behaving normally, either as a result of an intoxication, drug abuse or an underlying mental health issue. Subjectively, it appears that further attempts to communicate with the Complainant in the manner commenced by Cst. C may well have assisted in reducing the Complainant's state of agitation and apparent inability to communicate, as opposed to significantly enhanced police presence, forceful direction and ultimately the use of force by way of engaging the CEW.
88. It appears unlikely that a reasonable person, properly considering the totality of the circumstances before the display and deployment of the CEW, including Cst. B's training and the National Use of Force Framework, would conclude that there was "some likelihood of bodily harm" to any person.
89. It appears reasonable to conclude that the likelihood of bodily harm would only arise if force was used on the Complainant, and the use of force did not appear to be immediately required for any reason.
90. It appears on the circumstances facing the Members, and specifically Cst. B, that a reasonable person would be unlikely to conclude that the immediate use of force was necessary in all of the circumstances as:
- (a) de-escalation techniques had only been engaged briefly;
 - (b) and there was no apparent urgency to forcibly remove the Complainant;
 - (c) de-escalation techniques were the only reasonable option when confronted with a nonviolent subject evidencing apparent mental health issues and instability.

91. In all of the circumstances, therefore, it appears that Cst. B's decision to draw and display the CEW contravened section (6) of the CEW Provincial Standards and was unnecessary.

XXI Discharge of the CEW by Cst. B

92. As noted above, it appears that the CEW was discharged hitting the Complainant's lower body approximately 15 seconds after the unit was drawn. It also appears that the CEW was engaged up to 5 times by Cst. B, discharging in 5 second intervals.

93. Prior to discharging the unit, Cst. B had apparently told the Complainant was under arrest and attempted to issue directions for the Complainant to lay down so he could be handcuffed.

94. As noted above, sections (1) & (2) of the Provincial Standards provides as follows

CEW discharge

(1) Prohibit officers from discharging a CEW against a person unless:

- (a) The person is causing bodily harm to either themselves, the officer, or a third party; or*
- (b) The officer is satisfied, on reasonable grounds, that the person's behaviour will imminently cause bodily harm either to themselves, the officer, or a third party.*

(2) In addition to Standard (1) above, prohibit officers from discharging a CEW against a person unless the officer is satisfied, on reasonable grounds, that:

- (a) Crisis intervention and de-escalation techniques have not been or will not be effective in eliminating the risk of bodily harm; and*
- (b) No lesser force option has been, or will be, effective in eliminating the risk of bodily harm.*

95. It does not appear that Cst. B had the authority to rely on section 1(a) of the Provincial Standards because there is no evidence that the Complainant was causing bodily harm to himself or others.

96. In terms of standard 1(b), again the requirement is that Cst. B had to be satisfied, on reasonable grounds, that the Complainant's behaviour will "imminently cause bodily harm" to either themselves or others, including the Members.

97. Applying the same analysis as considered in the conduct of the pre-discharge display of the CEW, it appears that the only new fact relevant to Cst. B's decision to discharge the CEW was that the Complainant had not complied with directions given. It is significant, however, that only fifteen seconds appears to have elapsed between display of the CEW and the discharge of the weapon.

98. As well, it appears that Cst. B's conclusion that crisis intervention and de-escalation techniques had not worked was premature in all of the circumstances. Cst. C had made

some limited progress with the Complainant in her dealings with him, although it is unclear how much of that progress was known to Cst. B.

99. It appears self-evident that the Complainant was suffering from some form of debilitation as he wandered in the [REDACTED] Hotel lobby. It does not appear that the Complainant was actively committing criminal offences or threatening any person while cornered in the Hotel lobby. Rather, it appears that the actions of the Complainant were defensive in nature facing four members in uniform in a confined space.

100. It also appears clear that Cst. B did not have reasonable grounds to believe that further efforts at de-escalation might have been unsuccessful in having the Complainant voluntarily leave the hotel and submit to arrest. As noted above, there does not appear to have been any urgency in abandoning de-escalation in favour of the use of an intermediate force weapon, the CEW.

101. It appears as well that Cst. B's conclusion that no lesser force option would be successful in eliminating the risk of bodily harm was in all of the circumstances premature.

102. Considering all of the foregoing, it appears that Cst. B did not have reasonable grounds or good and sufficient cause to discharge the CEW towards the Complainant. As such it appears that Cst. B used unnecessary force against the Complainant without lawful authority and in breach of the Provincial Standards.

XXII Issue D – Existence of serious blameworthy conduct, or mistake of legal authority, or error forgivable because of a lack of training

103. The last matter to be considered is whether or not the apparent misconduct of Cst. B evidences serious blameworthy misconduct, as opposed to a mistake of legal authority or lack of training.

104. In considering these matters, it is noteworthy that the discharge of the CEW by Cst. B appears to have had the effect of precipitating an immediate violent confrontation with the Members as they attempted to arrest the Complainant. The struggle that ensued appears have seen several discharges of the CEW, baton strikes and kicks to the Complainant. Cst. B even appears to have repeatedly struck the Complainant in the face with the actual CEW unit itself in an effort to stun or disable him.

105. Ultimately, there is no dispute that the Complainant was subdued, forcibly withdrawn in handcuffs and hobbles from the hotel lobby, sedated by EHS paramedics and taken to hospital for further care.

106. In all of the circumstances, it appears that the display and discharge of the CEW by Cst. B evidenced serious blameworthy conduct for the following reasons:
- (a) It does not appear that Cst. B's perspective that there was an imminent risk of bodily harm was correct in all of the circumstances. It does appear that the Members were dealing with an unstable individual suffering some form of delirium or mental health issue. Failing to recognize and adequately deal with those facts appears to justify the conclusion that serious blameworthy conduct has been established on the part of Cst. B;
 - (b) It appears that by taking control of the dialogue with the Complainant and abandoning de-escalation attempts, Cst. B. set in motion a chain of events that precipitated a violent arrest with high risk to the Complainant and the Members that may have been avoidable;
 - (c) There does not appear to have been any urgent need to arrest and remove the Complainant from the hotel lobby; and
 - (d) It appears that the Complainant suffered baton and CEW strikes, kicks and facial lacerations as a result of the arrest that took place when continued de-escalation may have avoided such injuries.
107. It also appears that such misconduct did not arise as a result of a mistake of legal authority or lack of training. The FIR confirms that Cst. B had been recently re-certified in the use of the CEW, use of force principles and de-escalation techniques.
108. It appears, therefore, that Cst. B would have been aware of the limitations on his authority to deploy the CEW as he did.
109. As such, it appears that the actions of Cst. B in dealing with the Complainant are properly characterized as evidencing serious blameworthy conduct.

XXIII Conclusion – Misconduct Allegation # 1 – Cst. B

110. Taking into consideration all of the foregoing, it appears that Cst. B intentionally used force against the Complainant without lawful authority during the course of his arrest.
111. As such, it appears that the evidence supports the conclusion that Misconduct Allegation # 1 is substantiated against Cst. B.

XXIV Misconduct Allegation # 1 – Csts. A, C & D

112. A review of the FIR appears to confirm that Csts. A, C and D were in essentially similar circumstances with respect to allegations of misconduct in the use of unnecessary force relating to the Complainant. The similar circumstances appear to be as follows:
- (a) None of the three members had applied any force to the Complainant until the CEW was discharged by Cst. B;
 - (b) Each of the three members followed up on the discharge of the CEW by attempting to subdue and complete the arrest of the Complainant;
 - (c) Each of the three members encountered a highly agitated, injured and resistant Complainant as they attempted to complete his arrest; and
 - (d) Each of the members had found that their initial efforts to subdue the Complainant were unsuccessful requiring the use of increased force by all members to complete the arrest.
113. The analysis and law set out above with respect to examination of the actions of Cst. B applies to evaluation of the conduct of Csts. A, C & D. Specifically, the elements of proof required to be considered in a review of potential misconduct of the three members under section 77(3)(a)(ii)(A) are as follows:
- (a) Were the members acting in the performance or purported performance of their duties in dealing with the Complainant?
 - (b) Did the members intentionally or recklessly use unnecessary force on the Complainant?
 - (c) Did the members use force on the Complainant without good and sufficient cause?
 - (d) Was the conduct of the members characterized by a serious blameworthy element, not simply a mistake of legal authority or an error forgivable because of a lack of training?

XXV Issue A – Were the members acting in performance of their duties?

114. On the first issue, as with Cst. B and noted above, it appears clear that each of Csts. A, C & D were acting in performance of their duties as peace officers when they dealt with the Complainant. All Members were lawfully responding to 911 call dispatch reports of a possible disturbance and unwanted person at the [REDACTED] Hotel.

XXVI Issue B – Did the members intentionally or recklessly use force on the Complainant?

115. On the second issue, it appears evident that the force used by Csts. A, C and D on the Complainant was intentionally applied by each member.
116. However, it appears significant to note that none of the three members used of force until after the CEW had been discharged by Cst. B.

XXVII Issue C- Did the members use force on the Complainant without good and sufficient cause?

117. At the time the three members engaged the Complainant and began to use force in varying forms, the following circumstances appeared to exist:
- (a) The members knew that they were responding to a report of a disturbance and unwanted person at the [REDACTED] Hotel;
 - (b) The members also knew that notwithstanding the initial efforts of Cst. C and limited follow up by Cst. B, the Complainant had not left the hotel lobby as requested;
 - (c) Cst. B appears to have advised the Complainant that he was under arrest and directed him to lay on the ground so that handcuffs could be applied;
 - (d) The Complainant had not immediately complied with Cst. B's directions and evidenced resistance and agitation in the face of such direction;
 - (e) Cst. B had displayed and quickly discharged the CEW to subdue the Complainant; and
 - (f) The Complainant had fallen to the floor in response to the discharge of the CEW.
118. Csts. A, C and D appear to have had no option but to follow up on the decisions taken by Cst. B attempting to complete the arrest and removal of the Complainant. It appears that the situation facing the members, had escalated rapidly out of control subsequent to the discharge of the CEW.
119. At this point the three members appeared to have effectively assumed the role of cover officers supporting Cst. B's decision to complete the arrest the Complainant by the immediate use of the CEW. They appear to have done so to prevent the Complainant from injuring himself as he reacted to the CEW discharge and to prevent injury to other parties in the confined lobby area.
120. The use of force engaged by the members appears to have ranged from Cst. C holding the Complainant's legs, to Cst. A applying knee strikes to Cst. D applying his baton. All those escalating techniques appear to have been reasonable under the Use of Force Framework in all of the circumstances, particularly in light of the Complainant's resistance to his arrest.

121. As a result, it appears evident that Csts. A, C and D each used necessary force in their dealings with the Complainant for good and sufficient cause.

XXVIII Issue D - Was the conduct of the members characterized by a serious blameworthy element, not simply a mistake of legal authority or an error forgivable because of a lack of training?

122. It appears evident that none of the actions of Csts. A, C or D can be characterized by any serious blameworthy element. It would appear to be accurate that a reasonable person, properly informed of all circumstances, would conclude that the members were acting consistent with their training and using only the force reasonably required to subdue and ultimately arrest the Complainant.

123. It does appear from the FIR that the regrettable consequences of the use of force by the Members were injuries to the Complainant. It does not appear from the evidence, however, that the collective actions of Csts. A, C and D were undertaken thoughtlessly or vindictively. Rather, it appears that those members attempted to use all of their available professional tools and skills to bring under control a difficult and unfortunate situation.

124. Applying the legal principles noted above, it does not appear, therefore, that the actions of any of Csts. A, C and D in using force as they did with respect to the Complainant could be characterized by serious blameworthy conduct.

XXIX Conclusion – Misconduct Allegation # 1 – Csts. A, C and D

125. It appears, therefore, that the allegations of misconduct considered with respect to Misconduct Allegation # 1 in relation to Csts. A, C and D) are not substantiated on the evidence available in the FIR.

XXX Misconduct Allegation # 2 – Cst. B

126. The substance of Misconduct Allegation # 2 is that Cst. B failed to fully report on the injuries sustained by the Complainant as a result of the discharge of the CEW. Section 108 of the Police Act and VD policies 1.16.7 and 1.2.1 appear to have relevance to this issue.

127. As noted above, VPD policy 1.16.7 (the “Reporting Policy”) imposes clear reporting requirements on the reporting of injuries or death by members. The issue is whether or not the circumstances of this case appear to meet the reporting threshold set out in the Reporting Policies.

128. The Reporting Policy states as follows:

1.16.7

The B.C. Police Act contains a legislated requirement for all municipal police agencies to report incidents involving death, serious harm or Reportable Injuries which meet certain criteria to the Office of the Police Complaint Commissioner (OPCC). Vancouver Police Department members will report these incidents through the chain of command to the Professional Standards Section (PSS). PSS will report the incident to the OPCC.

A "Reportable Injury", as defined by the B.C. Police Act, means any of the following:

- a. Any contact made on a member of the public caused by the deployment of a firearm including; All long guns and hand guns; ii. Arwen; and iii. Beanbag Shotguns; regardless of whether or not the person required medical attention or was transported to the hospital for treatment;*
- b. An injury requiring emergency care by a medical practitioner or nurse practitioner and transfer to a hospital.*

An injury is deemed to be a Reportable Incident when:

- a. A person dies or suffers serious harm or a Reportable Injury while in the custody or care of a member of the VPD, or as a result of the operations of the VPD; or*
- b. A person dies or suffers serious harm or a Reportable Injury and the death, serious harm or reportable injury could be seen to be the result of the conduct of any member of the VPD or its operations;*

Reportable Incidents are not limited to events involving police use of force, but can include circumstances where injury or death has occurred as result of police actions. (e.g. Police involved motor vehicle incidents, as well injuries sustained by a suspect fleeing from the police).

PROCEDURE

1. An incident must be reported to the OPCC if the injury meets the following criteria:

- a. A person dies or suffers serious harm or a Reportable Injury:

 - i. While in the custody or care of a member of the Vancouver Police Department; or*
 - ii. As a result of the operations of the Vancouver Police Department; or**
- b. A person dies or suffers serious harm or a reportable injury and the death, serious harm or reportable injury could be seen to be the result of:

 - i. The conduct of any member of the Vancouver Police Department; or*
 - ii. The operations of the Vancouver Police Department. (In this instance, the injury or death could occur due to the actions of a member of another police department, but the involvement of the Vancouver Police Department in the incident still requires that it be reported in accordance with this policy);**

2. When an incident involving death, serious harm, or a Reportable Injury occurs:

- a. The member shall notify their supervisor of the incident immediately. The member will inform the supervisor of: i. The incident number; ii. A brief synopsis of the event; and iii. The nature of the injury;*
- b. The supervisor shall notify the Duty Officer and their respective Inspector of the incident immediately;*
- c. The Duty Officer shall:

 - i. Notify PSS of the Reportable Injury as soon as practicable, or, when the injury or incident is of a serious nature, immediately. An e-mail message to the Inspector and Staff Sergeants of PSS is an acceptable form of notification, except when an immediate notification is required. The Duty Officer will copy the notification to the member's Inspector; and*
 - ii. Complete a Reportable Injury Template;**
- d. The Professional Standards Section shall:

 - i. Notify the OPCC of the Reportable Injury; and*
 - ii. Maintain a record of Reportable Injury notifications made to the OPCC.**

129. Also relevant is VPD policy 1.2.1 dealing with the display or use of CEWs. This policy specifically requires the filing a report, VPD 840, when a CEW is displayed or discharged. There does not appear to be a form VPD 840 from Cst. B set out in the FIR. However, the substance of the form appears to have been subsumed by the SBOR reports as a result of directions provided to VPD members in policy 1.2.1. The SBOR reports now include significant new detail on any use of force, including use of a CEW. As noted above, Cst. B filed a detailed SBOR on the date of the incident with the Complainant.
130. In the circumstances of this case, it is not disputed that the Complainant was hospitalized following his arrest at the [REDACTED] Hotel. However, it appears that the hospital admission was largely based on the Complainant's mental health issues. Although the Complainant presented with facial lacerations, none of the other injuries reported in the Complaint appear to have been substantiated by evidence set out in the FIR, or made available to the Investigator.
131. Cst. B immediately reported his use of the CEW to the on duty supervisor upon exiting the [REDACTED] Hotel. His expectation was that his supervisor would report such use to the relevant duty officer and if needed, to Professional Standards and perhaps the OPCC.
132. Cst. B also appears to have set out his use of the CEW in the SBOR report filed immediately after the incident with the Complainant. That report specifically noted the fact that the Complainant had suffered facial injuries during the arrest.
133. In reviewing Cst. B's obligations under VPD Policy 1.16.7, it appears that:
- (a) The facial injuries sustained by the Complainant, although minor, were part of a constellation of issues requiring sedation of the Complainant, transmission by

ambulance to hospital and admission of the Complainant to hospital care under the *Mental Health Act*;

- (b) In light of the Complainant's admission to the emergency ward for treatment, the injuries in question met the technical definition of a "reportable injury" arising as a result of VPD actions taken involving the Complainant;
- (c) Cst. B, as required by policy, immediately notified his supervisor of the use of the CEW, the arrest of the Complainant, the general circumstances of the arrest and the need to move the Complainant to hospital for treatment. The FIR does not record the specific details of the briefing to the supervisor beyond those general facts; and
- (d) It appears that beginning at 16:52 the day of the Complainant's arrest, Cst. B filed his post arrest reports with VPD, including a SBOR, all of which detailed the CEW discharge and facial lacerations sustained by the Complainant.

134. Given Cst. B's oral briefing of his supervisor on scene, assistance in securing medical care for the Complainant and extensive post arrest written reports, it appears that the member has more than adequately discharged his duties of disclosure under VPD policies 1.16.7 and 1.2.1.

135. In light of the foregoing, I cannot find that Misconduct Allegation # 2 has been substantiated on the evidence set out in the FIR.

XXXI Conclusion

136. Applying the standard of review at this stage of the proceedings, pursuant to Section 117(9) and 117(8)(d)(i) of the *Police Act*, I find that there appears to be evidence set out in the FIR which, if proven, could substantiate Misconduct Allegation # 1 with respect to Cst. B, and require the taking of disciplinary or corrective measures.

137. I further find applying the same test, that the evidence in the FIR does not appear to substantiate:

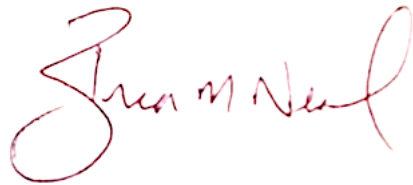
- (a) Misconduct Allegation # 1 with respect to Csts. A, C and D., and
- (b) Misconduct Allegation # 2 with respect to Cst. B

138. In accordance with section 117(11) of the *Police Act*, my decisions on the misconduct matters that do not appear to be substantiated are final and conclusive.

XXXII **Next Steps**

139. I hereby notify Cst. B of the next steps in this proceeding, pursuant to subsections 117(7) and (8) of the *Police Act*.
140. Considering the factors in section 120 of the *Police Act*, and in particular section 120(3), I am willing to offer a prehearing conference to Csts. B with respect to Misconduct Allegation # 1.
141. I am directing Csts. B to advise the Registrar within 5 days once a decision has been made on whether or not to accept the offer of a prehearing conference.
142. The range of disciplinary and corrective measures set out in the *Police Act* which I would consider appropriate in the current case includes:
- a. *requiring the member to engage with training or retraining in de-escalation techniques, and,*
 - b. *a suspension from service without pay*
- pursuant to subsections **126(1)** of the *Police Act*.
143. Pursuant to s 113 of the *Police Act*, the Complainant has the right to make submissions:
- (a) at a discipline hearing (as *per* section 117(8)(b)) or,
 - (b) if the members accept a prehearing conference, section 120(6) of the *Police Act*.
144. Pursuant to section 119, at a disciplinary hearing, Cst. B may request permission to question witnesses. Such a request must be made within 10 business days of this notification. Any such request will be directed to my attention through the Registrar.
145. Section 118(1) of the *Police Act* provides that a discipline hearing concerning the substantiated misconduct allegations must be convened within 40 business days of notice of this decision. That date is November 12th, 2020.
146. A pre-hearing conference call will be convened by telephone **September 25, 2020** at 9:00 am with Cst. B, or counsel on his behalf. At that time, dates will be canvassed that are convenient to commence the disciplinary hearing. The Registrar will advise the relevant parties as soon as possible of the conference call details.

147. In the event that date is unsuitable to Cst. B or his counsel, that party will advise the Registrar immediately and provide an indication of available dates and times for a conference call to be convened.



Brian M. Neal, Q.C.
September 15, 2020
Victoria, B.C.
